

Criminal Enforcement of Intellectual Property Rights in Latin America: An Institutional Grammar Tool Approach

Intellectual property rights enforcement is a central issue in most international, regional, and bilateral negotiations (Li, 2009), and a concern due to the growing perception of the extent of counterfeiting and piracy (Fink and Correa, 2009). Enforcement can be broadly understood as “making sure that legal rules are respected” (Seuba, 2017) in different areas or branches of the law. Criminal law is often seen as a last resort for conflict resolution; however, it can be used to sanction certain IPR infringements, such as trademark counterfeiting and copyright piracy, because of the nature of the harm (Manta, 2019). However, academic literature has not been able to determine if criminal sanctions effectively deter such conducts, especially in Latin American and Caribbean countries.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires member states “to provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting and copyright piracy, committed on a commercial scale.” (WIPO, 2018). Beyond international standards, criminal measures may also be agreed upon when national governments sign bilateral or regional trade agreements and afterwards, modify national laws and codes accordingly.

Despite the growing concern about IPR protection, the academic literature on criminal enforcement procedures and sanctions is sparse (Wechsler, 2010). We found that most academic research on this topic focuses on developed countries (Geiger, 2012; Luckenbill, D. and Miller, K., 2008; Marcowitz-Bitton, M., Fischman-Afori, O., Billauer, H., 2023). Evidence from Latin American countries related to criminal enforcement is even more scarce. Most research in this area has focused on the undesirable effects of enforcement measures in Brazil and Mexico (Pinheiro-Machado, R., 2020; Tozi, F., 2022) and Mexico (Domon, K., 2018; Aguiar, J., 2012; Observatorio Nacional Ciudadano, 2019).

This white paper examines the criminal enforcement of IPR in Latin America in terms of legal instruments, policies, and initiatives from an institutional perspective and specifically delves into the Mexican case. Our research approach is based on the Institutional Grammar Tool (IGT), an analytical framework linked to the Institutional Analysis and Development framework widely used to study institutional design and compliance behavior. This research is, to the best of our knowledge, a novel application of IGT in intellectual property and criminal law.

The paper is organized as follows. Section 2 provides the highlights of a cross-country comparison of the institutional design IPR criminal enforcement laws and regulations among Latin American countries listed in the USTR Special 301 Report watchlists. Section 3 presents a mixed-methods case study on Mexico, which seeks to explain why criminal enforcement of intellectual property rights declined between 2018 and 2023. Finally, section 4 discusses the policy implications of the findings.

2. The Institutional Design of Criminal Enforcement of Intellectual Property Rights in Latin America

Criminal law is seen as the foundational tool for effective IPR protection, acting as a last resort to protect public interest and deter severe violations, while also serving a preventive regulatory function. The effectiveness and desirability of criminal IP enforcement remain controversial due to concerns about costs, compatibility with justice principles, and its application in developing countries. Variations in criminal law in selected Latin American countries are crucial for understanding how Global South countries adapt their laws and how criminal IP laws integrate into Latin American penal state formation processes, which are deeply influenced by local contexts. This is undoubtedly a matter of institutional design.

The research identified six key bilateral and regional trade agreements with the U.S. (Chile, Colombia, Peru, Dominican Republic, Guatemala, and Mexico) that contain provisions for criminal IPR enforcement, often exceeding TRIPS standards. These agreements generally converge on requiring criminal procedures and penalties for willful trademark counterfeiting and copyright/related rights piracy on a commercial scale. However, a key difference is the lack of a consistent definition for “commercial scale”, leaving it to parties to define as well as the “specific severity of punishment”.

In terms of the highest standard of protection agreed upon between selected parties and the US, we identified that the **USMCA** ranks at the top by specifying several aspects related to “significant adverse impact” of copyright piracy as well as a broader scope for procedures targeted at counterfeit labels and packaging. On the other extreme, we found the Chile FTA which is less strict on these matters as well as import/export of infringing goods.

We found limited evidence of criminal policies in LAC listed countries targeted at deterring offenders from counterfeiting and copyright piracy. Institutions-in-form found in domestic laws, codes and regulations fail to establish organizational settings that can promote a proactive approach toward offending. Few examples such as the creation of intersecretarial commissions in Peru and Mexico were found, but their results cannot be tracked. The lack of such constitutive settings leaves the enforcement structure depending only on the regulative realm, namely the codification of offenses as well as the definition of certain criminal procedures.

In terms of the codification of offenses, governments either do so in industrial property or trademark specific and copyright laws or in their criminal codes. Offenses are far ranging and can include standard ones such as counterfeiting and copyright piracy, but others have codified complex conducts related to telecommunications and internet service providers liability, camcording or offenses infringing trade secrets and patents. However, the institutional design of such rules is meaningless without actual enforcement.

3. Strong as its Weakest Link Criminal Enforcement of Intellectual Property Rights in Mexico

Our research identified the current state of criminal enforcement of intellectual property rights (IPR) in Mexico, as the "Achilles' heel" of the country's IP system. Despite a long tradition of intellectual property since the 19th century and a robust, internationally recognized legal framework, commercial-scale trademark and copyright infringement remains widespread.

Reports from the USTR (Office of the United States Trade Representative) in the late 1990s and early 2000s criticized the ineffectiveness of criminal sanctions, even after the creation of institutions like IMPI, INDAUTOR, and specialized units within the Attorney General's Office (PGR, now FGR) following NAFTA. While the USMCA (United States-Mexico-Canada Agreement) revitalized IP legislation, USTR reports from 2019 to 2024 have adopted an "aggressive" tone in describing criminal enforcement, citing a lack of statistics, the apparent non-existence of investigations, and an "internal ban" within the FGR on seeking search warrants.

IPR enforcement in Mexico can occur through administrative, civil, criminal, border, and preventive channels. The criminal approach involves the Attorney General's Office (FGR) and federal judges. Despite a reform of the criminal justice system towards an adversarial model, official data reveals a significant decline in initiated investigations for industrial property and copyright offenses:

- **Investigations:** Initiated investigations for industrial property and copyright offenses decreased by 30% and 77%, respectively, between 2012-2017 and 2018-2023.
- **Tangible Actions:** Concrete actions (raids, seizures, arrests) by the UEIDDAPI (Specialized Unit for the Investigation of Copyright and Industrial Property Infringements) have sharply declined, with no enforcement actions reported from 2020 to April 2023, despite opened investigations.
- **Alternative Dispute Resolution:** Alternative dispute resolution mechanisms, such as mediation, have seen increased use, particularly for industrial property offenses.
- **Convictions:** Convictions are exceedingly rare, representing less than 1% of initiated investigations, with a clear downward trend and even zero convictions in some recent years.

While the FGR has constitutional autonomy, the specialized unit's (UEIDDAPI) public expenditure has decreased by 40% in real terms since 2018. The capacity of other entities (delegations, judges, police, customs) is unspecific and competes with other tasks.

The quantitative evidence of declining criminal IPR enforcement since 2018 is explained by qualitative analysis based on an Institutional Grammar approach that studies institutions-in-use defined as: rules, norms, and strategies that govern social systems as embodied in practice, irrespective of their formal or informal origin. Based on convergence analysis from interviews with enabling agents (law firms, private investigators, industry associations) the research found that criminal IPR enforcement in Mexico sharply declined shortly after 2018, coinciding with the past federal administration and the appointment of the Attorney General.

The dominant type of enforcement after 2018 is "forbearance," defined as "revocable state inaction toward legal violations." This is characterized by a high degree of selectivity in who and when enforcement actions are taken. This forbearance is driven by a broad taxonomy of activation conditions and enforcement constraints affecting IPR holders, enabling agents, and the authorities themselves as shown in Table 1.

Table 1. Activation conditions and execution constraints identified in interviews

ACTIVATOR	ACTIVATION CONDITIONS	EXECUTION CONSTRAINTS	ENABLERS
IP holders	<ul style="list-style-type: none"> Type of product and volume Awareness of criminal procedures 	<ul style="list-style-type: none"> Geographic priorities International events 	<ul style="list-style-type: none"> Industry connections Perception of IPR and criminal offenses
Authorities	<ul style="list-style-type: none"> Political or ideology stance Alignment with policies Type of product and volume 	<ul style="list-style-type: none"> Location (points of entry, wholesale vs retail) Type of offenders (retailers vs wholesalers) Lack of state capacity (digital) 	<ul style="list-style-type: none"> Shut investigation offices Low sustenance of organizations
Enablers	NA	NA	<ul style="list-style-type: none"> Unrelated IPR due to the

Procedural institutions such as forensic analysis practices and case management policies impacted criminal processes by making them lengthier or prone to failure. Once investigations were submitted to the public prosecutor, forensic specialists performed comparative analysis of goods that often were incompatible with the codification of the offense or demanded the impossible from the IP holder's perspective. During these years the FGR led a decentralization / centralization process which misled case management and increased enforcement costs.

4. Policy implications and research opportunities

The international IP regime includes criminal law as one size fits all tool for effectively protecting IPR; however, our research calls for a more nuanced approach. Despite criminal enforcement institutions sharing certain institutional grammar elements, cross country differences still exist. Convergence towards a strong-arms policy will not likely be sought and implemented by most national governments. Competing objectives in LAC countries such as drug trafficking, human trafficking or other serious crimes will still be prioritized.

Mutual trade and economic partnership agreements between LAC countries and USA establish a benchmark of criminal enforcement of IPR. As such, this benchmark sets out definitions, sanctions, authorities' powers, as well as other general aspects that could be implemented by parties. The USMCA sets a higher standard of criminal sanctions than any other agreement due to its recent

development, so it is likely that institutions stemming from similar and newer agreements between LAC countries with the US will eventually converge towards this standard.

It is unclear if criminal sanctions are the most efficient enforcement mechanism of IP. Strands of academic literature highlight the deterrent potential of criminal law and how it can deter offenders while other strands suggest how it can be counterproductive. Our research shows how the behavior of agents involved in the process is driven by emerging norms, rules and strategies that can overrule institutions-in-form carefully designed by governments. The case study on Mexico is a clearcut example of this. Despite signing a trade agreement that sets a very high standard of protection including criminal sanctions, it is surprising how the actual behavior of law enforcement agencies rallies against it and *de facto* decriminalizes certain offenses.

Avenues for further research on the criminal enforcement of IPR in Latin America can be divided into two separate but complementary routes. On one hand, point to conditions that favor or hinder criminal enforcement during the investigative and judicial processes. Our study case shows how under certain political contexts, institutions-in-use can create equilibrium that diverges from what is established in institutions-in-form such as trade agreements, national laws and criminal codes. Thus, studying each country on a longitudinal basis can lead to the identification of various enforcement equilibrium and its relationship with the political cycle.

Another avenue points to understanding cross-country differences in criminal enforcement of IP. Currently there are no available or comprehensible datasets that can help in identifying which countries tend to rely more on these measures and thus determine the effectiveness of such sanctions. However, our approach allows comparison thanks to the IGT better suited to the characteristics of LAC countries' state formation processes and their relationship with criminal justice systems. By studying how enforcement occurs or how it does not, it is a far more fruitful approach for rightsholders of trademarks and copyright, law enforcement agencies and other actors in the IP ecosystem.

5. Consulted references

- Aguiar, J.C. (2012). Policing new illegalities. In W. Pansters, Violence, Coercion, and State-Making in Twentieth-Century Mexico: The Other Half of the Centaur (pp. 159–182) Stanford University Press
- Correa, C. (2008). *The Push for Stronger Enforcement Rules: Implications for Developing Countries*. ICTSD Programme on Intellectual Property Rights and Sustainable Development
- Domon, K. (2018). An economic analysis of intellectual property rights infringement. In *Springer eBooks*. <https://doi.org/10.1007/978-3-319-90466-5>

- Geiger, C. (2012). *Criminal Enforcement of Intellectual Property A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing Inc.
- Hassan, E., Yaqub, O., & Diepeveen, S. (2010). *Intellectual Property and Developing Countries*. Santa Monica: RAND Corporation.
- Luckenbill, D. F., & Miller, K. (2008). POLICING INTELLECTUAL PROPERTY PIRACY: A STUDY IN CORPORATE CONTROL OF CRIME. *Journal of Crime and Justice*, 31(2), 27–64. <https://doi.org/10.1080/0735648x.2008.972125>
- Kammel, Kari, Survey & Legal Analysis of Select Global Trademark Anti-Counterfeiting Statutes & Evidence of Prosecutions (January 12, 2023). Marquette Intellectual Property Law Review, Forthcoming,
- Liu, H. (2015). The Policy and Targets of Criminal Enforcement of Intellectual Property Rights in China and the United States. *Washington International Law Journal Association*, 137-187.
- Manta, I. (2019). Explaining Criminal Sanctions in Intellectual Property Law. *Journal of Law & Innovation*, 16-36.
- Marcowitz-Bitton. (2023). *The Future of Criminal Enforcement of Copyright: The Promise of Civil Enforcement - The George Mason Law Review*. https://lawreview.gmu.edu/print_issues/the-future-of-criminal-enforcement-of-copyright-the-promise-of-civil-enforcement/
- Massadeh, A., Alnusair, F., Massadeh, F.-M., Alhusban, A., & Haloush, H. (2023). Is criminalisation necessary for the enforcement of intellectual property rights in Jordan and the UAE? Criminal v commercial measures. *Crime, Law and Social Change*, 353-368.
- Observatorio Nacional Ciudadano, (2020). Piratería en México: Diagnóstico de la oferta y de las acciones institucionales.
- Oficio No. FGR/UTAG/DG/005374/2023 en respuesta a la solicitud con folio 330024623001400
- Pinheiro-Machado, R. (2022). How Trinkets Became Counterfeits: Value and Intellectual Property in a Low-income Market in Brazil. In Goldgell-Carballo, *Piracy and Intellectual Property In Latin America*
- Seuba, X. (2017). *The global regime for the enforcement of intellectual property rights*. Cambridge: Cambridge University Press.
- Sharma, A., & Dube, D. (2021). The Relevance of Criminal Law in Intellectual Property Law Research. In I. Calboli, & M. Montagnani, *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives* (pp. 198-220). Online edition: Oxford University Press.

- Tozi, F. (2020). From piracy as a crime to piracy as a necessity. In Goldgell-Carballo, *Piracy and Intellectual Property In Latin America*
- Urbas, G. (2000). *Public Enforcement of Intellectual Property Rights*. Australian Institute of Criminology Trends & Issues.
- Wechsler, A. (2012). Criminal Enforcement of Intellectual Property Law - An Economic Approach. In C. Geiger, *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar Publishing Limited.